

act or omission of the accused constituted culpable negligence, or occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person other than burglary, sodomy, rape, robbery, or aggravated arson, as alleged.

### 199. ARTICLE 120—RAPE AND CARNAL KNOWLEDGE

#### a. RAPE

**Discussion.** Rape is the commission of an act of sexual intercourse by a person with a female not his wife, by force and without her consent. It may be committed on a female of any age. Any penetration, however slight, is sufficient to complete the offense (Art. 120c).

Force and lack of consent are indispensable to the offense. Thus, if the female consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a woman in possession of her mental and physical faculties fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she did in fact consent. Consent, however, will not be inferred if resistance would be futile, or where resistance is overcome by threats of death or great bodily harm, nor will it be inferred if she is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in the act of penetration will suffice. All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm.

It has been said of this offense, "It is true that rape is a most detestable crime . . . ; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."

If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the woman is of unsound mind or unconscious to an extent rendering her incapable of giving consent, the act is rape. Likewise, the acquiescence of a female child of such tender years that she is incapable of understanding the nature of the act, is not consent. A woman's prior lack of chastity is not a defense, but see 153b(2)(b) as to the admissibility of evidence of her unchaste character.

Among the offenses which may be included in a particular charge of rape are assault with intent to commit rape, assault and battery, and assault.

**Proof.** (a) That the accused had sexual intercourse with a certain female not his wife; and (b) that the act was done by force and without her consent.

#### b. CARNAL KNOWLEDGE

**Discussion.** Carnal knowledge is defined as the commission of an act of sexual intercourse under circumstances not amounting to rape, by a person with a female not his wife who has not attained the age of 16 years. As in rape, any penetration is sufficient to complete the offense (Art. 120(c)).

It is no defense that the accused is ignorant or misinformed as to the true age of the female, or that she was of prior unchaste character; it is the fact of the girl's age and not his knowledge or belief which fixes his criminal responsibility. Evidence of these matters should, however, be considered in determining an appropriate sentence.



An accused does not violate this article by committing an act of sexual intercourse with a female of 16 years or over. However, if the statute of a jurisdiction denounces sexual intercourse with a female under a certain age greater than 16 years, the violation of such a statute within the territorial limits of the jurisdiction by a person subject to the code may constitute conduct of a nature to bring discredit upon the armed forces in violation of Article 134.

**Proof.** (a) That the accused had sexual intercourse with a certain female not his wife; and (b) that she had not attained the age of 16 years.

## 200. ARTICLE 121—LARCENY AND WRONGFUL APPROPRIATION

### a. LARCENY

**Discussion.** (1) *General.* Under the provisions of Article 121, a person is guilty of larceny if he wrongfully takes, obtains or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind, with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner. A wrongful taking with intent permanently to deprive includes the common law offense of larceny; a wrongful obtaining with intent permanently to defraud includes the offense formerly known as obtaining by false pretense; and a wrongful withholding with intent permanently to appropriate includes the offense formerly known as embezzlement. Any of the various acts denounced as larceny by Article 121 may be charged and proved under a specification alleging that the accused stole the property in question.

Property which is taken, obtained, or withheld by severing it from real estate is within the class of property which may be the subject of larceny. Also within this class of property are writings which represent value, such as commercial paper.

(2) *Taking, obtaining, or withholding.* There must be a taking, obtaining, or withholding of the property by the thief. For instance, there is no taking if the property is connected to a building by a chain and the property has not been disconnected from the building; and property is not "obtained" by merely acquiring title thereto without exercising some possessory control over it. As a general rule, however, any movement of the property or any exercise of dominion over it by any means is sufficient if accompanied by the requisite intent. Thus, if a person entices another's horse into his own stable without touching the animal, or procures a railroad company to deliver to him another's trunk by changing the check on it, or obtains the delivery of another's goods to a person or place designated by him, or has the funds of another transferred to his own bank account, he is guilty of larceny if other elements of the offense are present. A person may "obtain" the property of another by acquiring possession without title, and one who already has possession of the property of another may "obtain" it by thereafter acquiring title thereto. A "withholding" may arise as a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property, or it may arise as a result of devoting property to a use not authorized by its owner. Generally, this is so whether the person withholding the property acquired it lawfully or unlawfully. See 200a(6). However,